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Supreme Court

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United States

OCTOBER TERM, 1969

No. 908

MARY GREEN and EDWIN GREEN, JR.,
As Administrator of the Estate of
EDWIN GREEN, Deceased,
Petitioners,

vs.

THE AMERICAN TOBACCO COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

LAWRENCE V. HASTINGS
IRMA ROBBINS FEDER
Attorneys for Petitioners
312 Biscayne Building
Miami, Florida 33130

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REPLY ARGUMENT [1]

I.

THE DECISION BELOW IN THE DIVERSITY CASE AT BAR CONFLICTS WITH FLORIDA IMPLIED WARRANTY LAW AS SET FORTH BY THE FLORIDA SUPREME COURT

Respondent's Brief does not address itself to the conflicts between the decision and opinion below and Florida Supreme Court implied warranty case-law set forth in the Petition at pp. 19-25 (and not repeated herein).

Instead, respondent-American Tobacco Company takes the position that "reasonably fit and wholesome" is the "correct definition" of the implied warranty involved and that the question of "reasonable fitness" is always a factual one for jury determination. Respondent's Brief (p. 13) cites four cases, Zabner v. Howard Johnson's Inc.,

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1/ "Pet." symbolizes the Petition for Writ of Certiorari, "App." the Appendix to the Petition, "C.T." the Certified Transcript, and "B.R." respondent's Brief in Opposition.

Fla. App. 1967, 201 So.2d. 824, Wisner v. Goodyear Tire & Rubber Co., Fla. App. 1964, 167 So.2d. 254, Gates & Sons, Inc. v. Brock, Fla. App. 1967, 199 So.2d. 291, and Royal v. Black & Decker Mfg. Co., Fla. App. 1967, 205 So.2d. 307. The Zabner case held that whether or not maple walnut ice cream containing a piece of walnut shell was fit for the purpose intended was a jury question. The Wisner case held that a jury should determine whether or not an underground lawn sprinkler system should have lasted longer than six years. The Gates case involved a scaffolding "snap tie" device and conflicting testimony concerning its alleged defectiveness or lack of safety. The Royal case upheld the dismissal of a complaint based on negligence, implied warranty, and strict liability in tort because there was no allegation that the power drill causing injury was unreasonably dangerous

or defective. Not one of the cases cited by respondent stands for the proposition that whether or not cigarettes proximately causing lung cancer are fit for human consumption is a jury question.

Indeed the Florida Supreme Court's advisory opinion in the case at bar explicitly declined to pass on "the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of law unmerchantable in Florida . . . " in view of the restricted nature of the certified question (154 So.2d. at 170, App. p. 38a, emphasis added); obviously said court contemplated that violation of the implied warranty involved would not always require jury determination of the "fitness" issue.

Semantics cannot obscure the crucial conflict between the decision and opinion below and Florida's imposition of absolute and strict liability for breach of implied warranty of fitness for human consumption (Pet. pp. 22-24). Petitioners submit that death-causing cigarettes can be deemed neither fit nor reasonably fit nor wholesome nor reasonably wholesome for human consumption.

Respondent notes Judge Simpson's reliance on Community Blood Bank, Inc. v. Russell, Fla. 1967, 196 So.2d 115 as approving the case at bar for remanding for "trial on issues of fact" (B.R. p. 13). In the Community Blood Bank case the Florida Supreme Court held the district court of appeal correct in reversing the dismissal of

an implied warranty complaint and remanding the cause for trial since the complaint stated a cause of action. The citation of the Florida advisory opinion answering the certified knowledge question in the case at bar (196 So.2d at 117) did not in any way involve the Federal Court of Appeals' remand of the case at bar for a new trial on "reasonable fitness."

The Florida Supreme Court's advisory opinion specifically declined to pass on "the disposition of issues between the court and jury" as not raised by the certified question; the opinion noted, however, the absence of any assumption of risk defense (fn. 2a) and "the problem of individual reactions to ordinarily harmless substances", a problem not presented in the limited non-

adversary proceeding involved (154 So.2d at 170, 171, App. pp. 37a-38a). Suffice to state that assumption of risk was not a defense at Trial No. 2 (C.T. Vol. I pp. 18-24, Vol. VII p. 41). Moreover, respondent has conceded the total absence of any evidence at Trial No. 2 supporting the "individual reaction" defense; respondent's "Brief for Appellee" on Appeal No. 2, filed in the Court of Appeals on Sept. 9, 1966, stated as follows at p. 27:

> "There was no dvidence that Green was 'peculiarly susceptible' or 'abnormally non-resistant' to cigarettes and no expert suggested the scientific availability of such proof as to any other smoker . . ."

Once again, the essential conflict of which petitioners complain is clearly revealed. The decision and opinion below, by holding that cancer-causing cigarettes

may be fit for human consumption although decedent did not assume such risk and was not peculiarly susceptible, emasculate Florida's absolute and strict liability for breach of the implied warranty involved.

II.

THE COURT OF APPEALS SHOULD HAVE CERTIFIED THE ENTIRE CASE AT BAR TO THE FLORIDA SUPREME COURT UNDER THE SPECIAL CIRCUMSTANCES INVOLVED.

Respondent contends that the entire case cannot be certified to the Florida Supreme Court and that no significant legal issue exists because there were "conflicting opinions among expert witnesses . . . and the jury resolved this case on its own particular

facts" (B.R. p. 16). Respondent is attempting to pull itself up by its own bootstraps since, as petitioners contended successfully prior to the en banc overruling below, respondent's expert witnesses' conflict-producing testimony to the effect that nobody knows the cause of lung cancer was an impermissible relitigation of the proximate cause issue conclusively decided by the first jury herein (Pet. pp. 33-34). More important, respondent begs the question of whether or not there was any factual liability issue for jury determination at Trial No. 2 in view of the special fact findings of the first jury (see Judge Coleman's dissenting opinion

below in which Chief Judge Brown and Judge Godbold joined, 409 F.2d at 1167, App. p. 111a) and/or in view of the lack of significant evidence presented by respondent at Trial No. 2 (see Sec. I of Reply Argument supra).

Petitioners' "Motion and Suggestion for Certification to the Supreme Court of Florida" filed shortly after the en banc decision below, (C.T. Vol. IX Doc. 18) renders it obvious that the state's highest court would resolve legal questions:

> "8.) Appellants suggest that a proper question to certify to the Florida Supreme Court is precisely the question which said Court and Judge Simpson recognize has never been before said Court . . . [391 F.2d at 111, 112, App. p. 101a, quoting from 154 So.2d at 170, see also 171, App. pp. 37a-38a.] Were the cigarettes which caused a cancer in this particular

> instance unmerchantable as a matter of law in Florida, i.e. not reasonably fit and wholesome for their general purpose?"

Paragraphs 9 and 10 of Petitioners' Motion suggested other proper questions for certification:

> "Are appellants entitled to jusgments on liability in the case at bar under Florida implied warranty law?
>
> * * *
>
> "Assuming that the Florida Supreme Court does not now seem appellants entitled to judgments on liability under Florida implied warranty law, are appellants entitled to a new trial on the liability issue of 'reasonable fitness' under Florida implied warranty law as said

Florida Supreme Court will then determine it?" 2/

Respondent's argument (B.R. p.16) that "the Florida certification Statute and Rule do not . . . contemplate that the Florida Court can decide which party should prevail on the merits" ignores or overlooks the one time when the certification procedure does so contemplate, namely, when a party should

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2/ Respondent's assertion that petitioners' "Motion and Suggestion for Certification ..." was "untimely" (B.R. p. 15) overlooks the facts that (1) the Court of Appeals did not formulate its rule requesting the Florida Supreme Court to deem itself not restricted by the language of certified questions until after the failure of the certification procedure during the first appeal in the case at bar (Pet. pp. 27 & 28) and (2) Petitioners' position that they were entitled to judgment on liability was upheld by the Court of Appeals after Trial No. 2 (391 F.2d 97, App. 66a) until the overruling by the Court en banc (409 F.2d 1166, App. p. 110a). Petitioners' "Amended Petition for Rehearing" following the en banc decision also requested full certification to the Florida Supreme Court.

prevail as a matter of law (see petitioners' first and second suggested questions for certification, supra). In any event, petitioners' third suggested question sets forth the relevant propositions of law to be decided by the Florida Supreme Court if said court should deem a new trial on reasonable fitness necessary.

Respondent's reliance (B.R. p. 15) on petitioners' statement that the case at bar "will obviously have severely limited value as precedent" is misplaced. The "Brief for Appellants Following Granting of Rehearing En Banc", p. 35, explained the statement in terms of the now-required warning on cigarette packages and the fact that Florida's unusually strict implied warranty law does "not represent the majority rule." Although the American

Tobacco Company may have new defenses in subsequent cigarette-cancer cases as well as the benefit of implied warranty law more "liberal" to manufacturers in other states, Florida's implied warranty law is of utmost importance to Florida and basic implied warranty law established in the case at bar will govern Floridians regardless of additional law to be formulated concerning the "Caution" warning, addiction-response, etc. As stated in Chief Judge Brown's dissenting opinion in which Judges Coleman and Godbold joined (409 F.2d at 1169, App. p. 119a, .. emphasis added), "Florida has a great stake in fashioning the products liability standards as a sanction to a strong judicial policy of protecting Floridians from the conse-

quences" of cancer-producing cigarettes.

Respondent's Brief cites three cases (B.R. p. 15) in which the Court of Appeals refused to invoke the Florida certification procedure, namely, Motor Vehicle Cas.Co. v. Atlantic National Ins. Co., 5th Cir. 1967, 374 F.2d 601, Hamilton v. Maryland Cas. Co., 5th Cir. 1966, 368 F.2d 768, and Greer v. Associated Indem. Corp., 5th Cir. 1967, 371 F.2d 29. The salient point is that Greer involved a legal issue where there was "simply no room for doubt" as the court "read the Erie signal loud and clear with no need for amplification" (371 F.2d at 30), Hamilton dealt with a "simple" question, (368 F.2d at 769), and the Motor Vehicle Cas. Co. case posed a legal question insufficiently "intricate" or "repetitive" for certification (374 F.2d at 602) . All

three opinions were unanimous. Moreover, all three were written by the same Chief Judge Brown who dissented vociferously from the en banc opinion below in the case at bar, and in Hamilton and Greer Judge Godbold was a member of the unanimous panel, the same Judge Godbold who joined in Chief Judge Brown's dissenting opinion in the case at bar (409 F.2d at 1168, App. p. 116a).

In United Services Life Insurance Co. v. Delaney, 5th Circ. 1964, 328 F.2d 483, cert. den. 377 U.S. 935, 84 S.Ct. 1335, 12 L.Ed.2d 298, the court stayed an appeal involving the construction of insurance contracts under ambiguous Texas decisions pending state determination of decisive state law questions; as stated in Judge Brown's concurring opinion at 485, "When nine Judges . . . state they cannot

agree what controlling law is, I do not think the case can any longer be described as 'easy' or 'simple'". In the case at bar, not one of the Court of Appeals' numerous opinions concerning Florida implied warranty law has ever been unanimous (409 F.2d at 1170, App. p. 119a, fn. 13).

In Martinez v. Rodriguez, 5th Cir. 1969, 410 F.2d 729, the panel consisted of Chief Judge Brown and Judges Coleman and Simpson. Chief Judge Brown's opinion for the court stated as follows:

> "Once again we witness the effectiveness--both substantive and administrative-- of Florida's remarkably helpful certification procedure by which the Florida Supreme Court determines for us the controlling question of Florida law . . .
>
> "We would be remiss if we did not once again seize the opportunity to extol the virtues of the certification procedure . . . No matter how

many Federal Judges, trial, appellate, three-Judge panel, or the full panoply of the court en banc, any decision would have been an Erie-guess . . .

"There are, to be sure, purists who somehow feel that a struggle of uncertainty leading even to the likelihood of an erroneous but speedy result is better than the slight time it takes to get an authoritative answer. But so long as Florida is with us and has this responsive mechanism that not only lights our lights but keeps us straight at the same*time, this tribunal is grateful for the substitution of certainty for the sometimes scholastic, always uncertain, exploration into what the local Judges would say the local law is.

"With dispatch and positiveness Florida answers the Florida question. What more could one want?"

(410 F.2d at 430-*431, emphasis added).

Petitioners want no more and respectfully submit that they are entitled to no less either.

III.

THE DECISION BELOW VIOLATES PLAINTIFFS' RIGHT TO A FULL AND FAIR JURY TRIAL UNDER THE SEVENTH AMENDMENT.

Respondent's Brief (B.R. p. 17) relies on Judge Simpson's conclusion that plaintiffs' expert witnesses invited defendant's expert witness testimony to the effect that no-one knows the cause of lung cancer. Once again semantics confuse the issue. Plaintiffs' expert evidence established a causal link between cigarette smoking and lung cancer in about 10% of heavy smokers, a causal link in the legal sense, whereas defendant's experts not only testified that the "basic cause"

of cancer is unknown (a medical opinion) but also that no causal link whatsoever between smoking and lung cancer has been proven (Pet. p. 13 with citations to the Certified Transcript). Petitioners contend that Trial No. 2 could not and did not meet the requirements of the Seventh Amendment in view of defendant's expert "testimony categorically contradictory to that which had already been found as a fact" by the jury at Trial No. 1, i.e. that Green Sr.'s fatal lung cancer was proximately caused by defendant's cigarettes (409 F.2d at 104, App. p. 83a).

Petitioners submit that the significant errors committed during Trial No. 2 can be dismissed as "minor matters" (B.R. p. 17) only if, as petitioners, Chief Judge Brown and Judges Coleman and

Godbold contend, petitioners are now entitled to judgments on liability as a matter of law.

CONCLUSION

For the foregoing reasons as well as those stated in the Petition for a Writ of Certiorari, it is respectfully submitted that Certiorari should be granted and the decision below reversed.

Respectfully submitted,

By _____

IRMA ROBBINS FEDER
and
LAWRENCE V. HASTINGS
312 Biscayne Building
Miami, Florida 33130
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, a member of the Bar of the Supreme Court of the United States, hereby certify that a true copy of the foregoing Petitioners' Reply Brief was served on Respondent by mailing a copy thereof in a duly addressed envelope to A. LEE BRADFORD, ESQ., Dixon, Bradford, Williams, McKay & Kimbrell, 101 E. Flagler St., Miami, Florida 33131, to JANET C. BROWN, ESQ., Chadbourne, Park, Whiteside & Wolff, 25 Broadway, New York, N.Y. 10004, and to ABE KRASH, ESQ., 1229 19th St., N.W., Washington, D.C. 20006, Counsel for Respondent, this 12th day of February, 1970.

Irma Robbins Feder